



TENDERING - UNDERSTANDING AND MANAGING THE LEGAL RISKS FOR YOUR ORGANISATION

WIN In-House Counsel Day Perth 2017

Outline

1. What is the Tender Process
2. The Process Contract - Explained and Explored
 - What is the Process Contract?
 - How is it created?
 - What are the consequences of breaching the Process Contract?
 - How do Tenderers discover a breach of the Process Contract?
3. From Tender to Contract Execution – Key Considerations



What is a Tender Process?

Many different names.....

Expression of Interest (EOI)

Request for Information (RFI)

Invitation to Tender (ITT)

Request for Proposal (RFP)

Request for Tender (RFT)

Request for Quotation (RFQ)

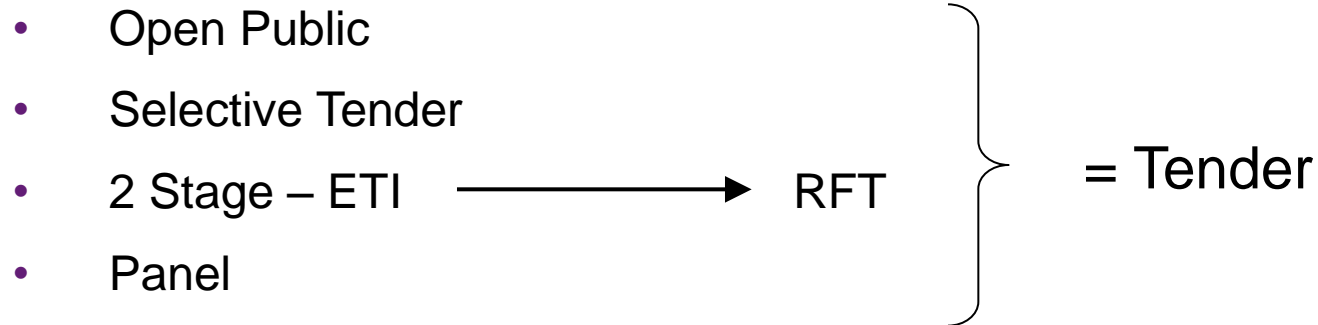
Invitation to Bid (ITB)



= Tender

What is a Tender Process?

Many different methods.....



What is a Tender Process?



Request / Invitation

- Prepared and issued by the Principal
- Must contain:
 - Invitation
 - Conditions of Tender
 - Information about Tender and Contract
 - Required content and format for proposals
- Legal, technical and commercial input
- Clarity and certainty



Conditions of Tender

- Closing date and time
- Validity period
- Negotiation rules
- Bid security
- Conditions of tender not contract
- Need for certainty but with flexibility for the Principal

The Process Contract

One or Two Contracts?

- **One Contract (before Hughes Aircraft)**
 - (i) Invitation to Tender (Invitation to Treat)
 - (ii) Tender (Offer)
 - (iii) Letter of Acceptance (Acceptance)



the only contract formed is the one for the works/services/goods/equipment

The Process Contract

- **Two Contracts (after Hughes Aircraft)**
 - A contract exists between the party calling the tender and each person that submits a tender ("process contract")
 - The terms of the process contract are the conditions of tender
 - Failure to act in accordance with the conditions of tender throughout the tender process will amount to a breach of the process contract
 - Both the Principal and the tenderer are bound by the terms of the process contract

The Queen in Right of Ontario et al v Ron Engineering & Construction Eastern Ltd (1981) Canada

Hughes Aircraft Systems International and Airservices Australia (1997) 146 ALR 1

IPEX ITG Pty Ltd (in liq) v State of Victoria [2010] VSC 480

What if there is no Process Contract – what are the other legal risks?

- Misleading and Deceptive Conduct
 - Hughes Aircraft
 - *Fabcot Pty Ltd v Port Macquarie-Hastings Council* [2010] NSWSC 726
- Breach of Good Faith



What are the consequences of breaching the Process Contract?

■ Damages – Loss of Profit

- J&A Developments v Edina Manufacturer Ltd, Amoura Ltd Ors [2006] NIQB 208
- Amber Contracting Limited v Halifax (Regional Municipality) 2008 NSSC 208

■ Damages – Loss of Chance

- Difficult to prove
- Difficult to quantify



The Process Contract – can it and should it be excluded?

Can You Exclude the Process Contract?

- Very clear, unequivocal language is required
 - Cubic Transportation Systems Inc & Anor v State of New South Wales & 2 Ors (2002)

- The court will look at all the terms and conditions of the tender document and make an assessment on balance as to whether or not a process contract is created

- The exclusion clause will not be considered in isolation
 - Amber Contracting Limited v Halifax (Regional Municipality) 2009 NSCA 103
 - Tercon Contractors Ltd v British Columbia (Transportation and Highways) 2010 SCC4

The Process Contract – can it and should it be excluded?

Should you exclude the Process Contract?



The Process Contract – can it and should it be excluded?

- Excluding the Process Contract can:
 - benefit the Principal
 - assist the Principal to claim damages from a preferred Tenderer who refused to execute the ultimate Contract
 - Ron Engineering & Construction Eastern Ltd [1981] 1 SCR 111 Canada
 - City Polytechnic of Hong Kong v Blue Cross (Asia Pacific) Insurance [1994] HK CFI 355
 - potentially gives the Principal flexibility when dealing with tenderers without the process contract risk but not necessarily without legal risk
 - lead to uncertainty in the tender process

How do Tenderers uncover a breach of the Process Contract?

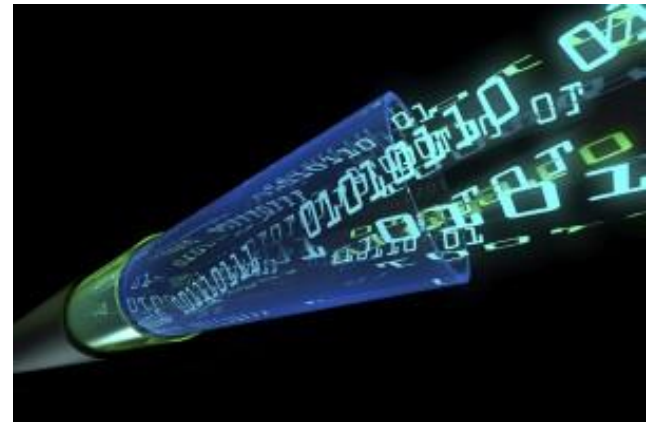
Preliminary Discovery

- Griffin Energy Pty Ltd v Western Power Corporation [2006] FCA 1242
 - Coal fired power station in Western Australia
 - Mandatory requirements
 - Environmental standards
 - Power output
 - Tender awarded to Wambo – Griffin Energy doubted mandatory requirements complied with
 - Made application for preliminary discovery



How do Tenderers uncover a breach of the Process Contract?

- Telstra Corporation Limited v Minister for Communications, Information Technology and the Arts (No.3)[2007] FCA 1567
 - \$600m broadband grant
 - 5 tenderers
 - Included Optus and Telstra
 - Optus and government negotiating for \$900m
 - Telstra considered unfair
 - Applied for preliminary discovery
 - Tenderer clarification questions



Compliance Risks

Key Compliance Risks – The Top Ten

1. Not all information to tenderers at the same time (level playing field), uncontrolled site visits
2. Late tenders
3. Not disclosing criteria or using adopted criteria
4. Negotiating price
5. Using IP of losing tenderer to improve project with contractor
6. Disclosure – not disclosing as required or not giving post tender de-brief
7. Entering into projects contracts that are significantly different to that tendered/inappropriate variations
8. Improperly managed conflicts of interest
9. Confidential information - leaks
10. Tender period

China Harbour Engineering Company (Group) v The Secretary For Justice Of The Hong Kong Special Administrative Region [2007] HKCA 66

Wagdy Hanna Wagdy Hanna and Associates Pty Ltd v National Library of Australia [2012] ACTSC 126

From Tender to Contract Execution – Key Considerations

Tender Documents should:

- describe process for contract formation; and
- never be included in contract:
 - some content may be relevant but rarely all
 - form and language not suitable for contract



PRA Electrical Pty Ltd v Perseverance Exploration Pty Ltd & Anor [2006] VSC 432

From Tender to Contract Execution – Key Considerations

Letter of Acceptance

- Common practice in construction industry
- Primarily used for expediency
- Risky because:
 - uncertainty about details
 - usually issued in a rush
 - usually issued by project person (who may not have all relevant information)
 - tenders not always clear

Golden Rules

1. Tender documents must be clear and complete
2. Input from technical, commercial and legal
3. Do not include tender documents in contract
4. Be very careful about letters of acceptance or award



Questions?

